Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

UNITED STATES AND CALIFORNIA *EX REL.* O'CONNELL AND MOYERS,

Petitioners,

v.

CHAPMAN UNIVERSITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners' notice of appeal was timely under controlling circuit precedent, but that precedent was later abrogated. The Ninth Circuit then reluctantly concluded that it was required to dismiss Petitioners' appeal due to this Court's bitterly contested 5-4 decision in *Bowles v. Russell*, 551 U.S. 205, 209-15 (2007), which held that noncompliance with the time limit in 28 U.S.C. § 2107 is a jurisdictional bar that cannot be equitably excused by a circuit court.

But in *Bowles*, neither the parties nor this Court considered whether a circuit court that lacks "power to proceed with the appeal" on the merits may at least "exercise ... its supervisory appellate power ... [to] dispos[e] of the case as justice requires" in a way that prospectively cures the noncompliance with § 2107. *Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 676 (1944). *Bowles* thus overlooked this Court's longstanding equitable practice of "vacat[ing] ... and remand[ing] ... [for] ent[ry] [of] a fresh decree from which ... a timely appeal" may be "perfect[ed]"—a practice it uses where § 2107's time for appealing to the circuit court has elapsed because the appellant reasonably took a jurisdictionally improper direct appeal to this Court instead. *See, e.g., Phillips v. United States*, 312 U.S. 246, 254 (1941). That traditional practice has been uniformly applied by this Court for at least 60 years, in 50 cases, by 30 Justices, including a majority of the current Court.

The question presented is whether the Courts of Appeals, when justly disposing of an appeal that is jurisdictionally untimely due to a judicial error, may vacate and remand for entry of a fresh judgment from which a timely appeal may be taken.

PARTIES TO THE PROCEEDING

Petitioners in this case are Dr. Katherine R. O'Connell and Dr. Chris Moyers, who were Plaintiffs-Appellants below.

Respondent is Chapman University, which was the Defendant-Appellee below.

Daniel Robert Bartley, who was Petitioners' counsel below, was also an Appellant below in part.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Dr. Katherine R. O'Connell and Dr. Chris Moyers, respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's order dismissing Petitioners' appeal is unreported. Pet.App. 1a.[1] The order of the United States District Court for the Central District of California granting Respondent's motion for summary judgment is also unreported. *Id.* 4a.

JURISDICTION

The Ninth Circuit filed its order on August 17, 2010. On November 10, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari until December 17, 2010. No. 10A472. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2106 and 28 U.S.C. § 2107, as well as predecessor versions of those statutes, are set forth in full in the appendix.

STATEMENT OF THE CASE

1. On April 3, 2006, Petitioners filed a complaint in federal district court that alleged claims against Respondent under, *inter alia*, the Federal False Claims Act, 31 U.S.C. § 3729 *et seq.*, and the California False Claims Act, Cal. Gov. Code § 12650

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[1] Herein: (1) "Pet.App." refers to the appendix of this petition; (2) "CA9 Docket" refers to the Clerk's Docket in No. 07-56864 (9th Cir.); and (3) "E.R." refers to the Excerpts of Record filed in No. 07-56864 (9th Cir.), *see* CA9 Docket # 38.

et seq. *See* Pet.App. 9a-10a. The United States and California both declined to intervene as formal parties. As a result, Petitioners litigated the action as *qui tam* relators on behalf of those governments. *Id.* 5a.

On October 23, 2007, the district court filed an order granting summary judgment to Respondent. *Id.* 4a. And the next day, October 24, 2007, the court entered judgment for Respondent. *Id.* 3a.

2. On December 21, 2007, which was 58 days after the district court entered judgment, Petitioners filed their notice of appeal. *Id.* Under 28 U.S.C. § 2107 and Fed. R. App. P. 4(a)(1), although a notice of appeal ordinarily must be filed within 30 days of judgment, a 60-day period applies when "the United States ... is a party." And, under controlling Ninth Circuit precedent at the time of the judgment here, the 60-day period had been held applicable to all federal *qui tam* cases because of the United States' interest and involvement, even if the government had declined to intervene as a formal party. *See United States ex rel. Haycock v. Hughes Aircraft Co.*, 98 F.3d 1100, 1102 (9th Cir. 1996). Petitioners expressly cited *Haycock* in their notice of appeal. E.R. 2.[2]

The parties proceeded to brief the merits on a schedule ordered by the Ninth Circuit. By May 27,

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[2] Petitioners' notice of appeal also included an appeal by their counsel related to a discovery sanctions order. Pet.App. 3a; E.R. 1. In addition, Respondent later filed a notice of appeal from a post-judgment order that denied its motion for attorneys' fees. Pet.App. 2a-3a. Both of those separate appeals have been finally resolved in the Ninth Circuit, *see id.* 3a; CA9 Docket # 64, and neither of them is before this Court.

2009, Petitioners and Respondent had each filed their principal merits briefs and the case was nearly ready to be submitted to the court for argument or decision. *See* CA9 Docket # 24, 31, 42.

However, on June 8, 2009, this Court issued its decision in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009), holding that the 60-day period for appeal is unavailable in *qui tam* cases where the United States is not a formal "party" due to its non-intervention. *Id.* at 2233-37. In concluding that the 30-day period applies in such cases, this Court expressly abrogated the Ninth Circuit's *Haycock* decision, as well as identical decisions in the Third, Fifth, and Seventh Circuits. *See id.* at 2233 n.1. Although this Court was aware that its ruling created "the possibility of harsh consequences" for "those who relied on the holdings of courts adopting the 60-day limit," it explained that it would be improper to allow that backward-looking "possibility" to bias its forward-looking conclusion concerning the proper legal interpretation of § 2107 and Rule 4(a)(1). *See id.* at 2236 n.4.

Shortly thereafter, Respondent moved to dismiss Petitioners' appeal as untimely filed. CA9 Docket # 52. The Ninth Circuit stayed the appeal pending resolution of a separate case in which a different panel was already considering the implications of *Eisenstein* for *qui tam* appeals that, in reasonable reliance on *Haycock*, had been filed during the 30-to-60-day window. Pet.App. 2a.

3. In the related case, the Ninth Circuit ultimately concluded that, while it "sympathized with [appellants] who complied with [its] precedent in filing ... notice[s] of appeal," it could provide no

relief to such litigants. *See United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949, 957 (9th Cir. 2010), *cert. denied* 131 S. Ct. 366 (2010). The court explained that, under this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), the untimely filed notice of appeal "deprive[d] [it] of jurisdiction." *Haight*, 602 F.3d at 953. And the court further reasoned that *Bowles* "ha[d] instructed ... that concerns of equity must give way before the 'rigorous rules' of statutory jurisdiction," as purportedly illustrated by the decision in *Bowles* to overrule as "illegitimate" two earlier cases that had allowed appellate courts to excuse noncompliance with the appellate time limits in "unique circumstances." *Id.* at 953, 956. The *Haight* panel emphasized, however, that it was "a serious understatement to call [its] result 'inequitable,'" given that the appellants there—like Petitioners here—had "reasonably relied on Ninth Circuit precedent that gave them 60 days to file a notice of appeal." *Id.* at 953.

4. Following *Haight*, the Ninth Circuit in this case summarily held that "dismissal of [Petitioners'] appeal[]"was "require[d]." Pet.App. 2a. In so holding, the court stated that a "remand" to the district court "would be futile." *Id.* 3a.

REASONS FOR GRANTING THE PETITION

As Justice Ginsburg and others have noted, *Bowles v. Russell*, 551 U.S. 205 (2007), "moved in a different direction" from this Court's recent decisions limiting the types of rules that are subject to the stringent requirements of "jurisdictional" rules. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1250 (2010) (opinion concurring in part and

concurring in the judgment). This case presents this Court with an opportunity to mitigate the indisputably inequitable results created by *Bowles*, while still faithfully adhering to *Bowles*' holding that noncompliance with the time for filing a civil appeal is a jurisdictional bar that cannot be equitably excused. *Bowles* declined to redress justifiable noncompliance with 28 U.S.C. § 2107—and overruled the "unique circumstances" doctrine—because the appellant there had failed to provide this Court with a legitimate method for taking equitable considerations into account under a rule that had long been treated as jurisdictional. *See Bowles*, 551 U.S. at 209-10, 213-15. Yet a principled and well-established equitable vehicle does exist in the particular context of § 2107.

Specifically, although an appellate court that lacks jurisdiction never has the power to retain the case for an adjudication on the merits, it always possesses the equitable power to dispose of the appeal in a just manner, which includes disposing of it in a way that prospectively cures the jurisdictional defect. Accordingly, this Court has a longstanding equitable tradition, in cases involving improper direct appeals under ambiguous jurisdictional statutes, of vacating and remanding for entry of a fresh judgment so that a timely appeal can be taken to the proper circuit court. *See, e.g., Walling v. James V. Reuter, Inc.*, 321 U.S. 671, 676-77 (1944); *Phillips v. United States*, 312 U.S. 246, 254 (1941). This equitable vacatur tradition has been consistently and unquestioningly applied by this Court for at least 60 years, in 50 different decisions, by 30 different Justices—including, most recently, in a 1995 decision joined by Justices Scalia, Kennedy,

Thomas, Ginsburg, and Breyer. *See Franklin v. Lawrimore*, 516 U.S. 801 (1995); *Castro Cnty. v. Crespin*, 101 F.3d 121, 124-25 (D.C. Cir. 1996).

The equitable vacatur practice reflects "a long line of this Court's decisions left undisturbed by Congress," which is the very type of tradition that this Court has observed is the essential basis of *Bowles*' jurisdictional holding. *See Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen*, 130 S. Ct. 584, 597 (2009). Consequently, just as tradition was the reason in *Bowles* for treating the civil appeal time limit as jurisdictional, so too tradition is the reason why appellate courts possess the equitable power to vacate and remand for a fresh judgment when the untimeliness of the appeal was caused by a judicial error. To retain the traditional jurisdictional characterization of appellate time limits while abandoning a traditional equitable remedy for jurisdictionally untimely appeals would transform into a full-blown conflict the "undeniable tension" that Justice Ginsburg has identified between *Bowles* and this Court's remaining jurisdictional jurisprudence. *See Reed Elsevier*, 130 S. Ct. at 1250-51 (opinion concurring in part and concurring in the judgment). Indeed, such a "bait and switch" would indisputably be an "intolerable" way for "the judicial system to treat people." *Bowles*, 551 U.S. at 215 (Souter, J., dissenting).

In recent Terms, this Court has made a concerted effort to scrutinize lower court holdings characterizing rules as jurisdictional, in part because of the propensity of such rules to deny litigants their full day in court, no matter how justifiable their noncompliance or how inequitable the result.

Bowles' seeming elimination of the role of equity under § 2107 was contrary to that trend, and so it is all the more troubling that its unjust result flowed directly from the failure of the parties to inform this Court of the full scope of an appellate court's powers to dispose of a case. Accordingly, this Court should grant certiorari to review, and then correct, the Ninth Circuit's erroneous conclusion that dismissal of Petitioners' appeal is required by *Bowles* and that remand would be futile.

I. APPELLATE COURTS POSSESS THE EQUITABLE POWER TO DISPOSE OF A JURISDICTIONALLY UNTIMELY APPEAL BY VACATING AND REMANDING FOR ENTRY OF A FRESH JUDGMENT FROM WHICH A TIMELY APPEAL CAN BE NOTICED

Bowles' jurisdictional holding was based on settled tradition. Yet this Court has an even more settled tradition, in certain cases where it lacks appellate jurisdiction, of prospectively curing jurisdictionally untimely appeals by vacating and remanding for entry of a fresh judgment that restarts the appellate clock. And the Courts of Appeals likewise have the power to provide such equitable relief when they lack jurisdiction over an untimely appeal.

A. *Bowles* Relied On Tradition In Holding That An Untimely Civil Appeal Is A Jurisdictional Bar That Appellate Courts Cannot Equitably Excuse

1. *Bowles* presented the question "whether [a] Court of Appeals ha[s] jurisdiction to entertain an appeal filed after the statutory period" established in § 2107, where the untimeliness was caused by the

fact that "a District Court purported to extend a party's time for filing [its] appeal beyond the period allowed by statute." 551 U.S. at 206. In particular, the district court, when granting Bowles' motion to reopen the time for appealing from the denial of his habeas petition, had given Bowles three more days than was permitted under § 2107(c), and the question presented was whether the Sixth Circuit had correctly decided that it therefore lacked jurisdiction to hear the merits of Bowles' appeal. *See id.* at 207.

A five-Justice majority of this Court held that Bowles' "untimely notice—even though filed in reliance upon [the] District Court's order—deprived the Court of Appeals of jurisdiction." *Id.* at 206-07. The majority reasoned that this Court "ha[d] long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature." *Id.* at 206. In order to demonstrate this Court's "longstanding treatment of statutory time limits for taking an appeal as jurisdictional," the majority provided a string-cite of seven cases—five from after 1960 and two from the nineteenth century. *Id.* at 209-10 & n.2. Although two other decisions from the early 1960's had nevertheless permitted appellate courts to adjudicate the merits in the "unique circumstances" where an untimely appeal was caused by a district court's error, the majority elected to overrule those cases, reasoning that "this Court has no authority to create equitable exceptions to jurisdictional requirements." *Id.* at 213-14 (overruling *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (*per curiam*), and *Thompson v. INS*, 375 U.S. 384 (1964) (*per curiam*)). Finally, responding to the concern that the result of

its decision was "inequitable," the majority observed that "Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits." *Id.* at 214.

Four Justices in *Bowles* dissented, objecting that it was "intolerable for the judicial system to treat people this way[] and [that] there [was] not even a technical justification for condoning this bait and switch." *Id.* at 215 (Souter, J., dissenting). The dissenters argued that, in a recent line of decisions, this Court "ha[d] tried to clean up [the] language" in its older cases, which had been "less than meticulous" when characterizing rules as "jurisdictional." *See id.* at 215-17. And the dissenters explained that, as part of that jurisprudential project, this Court had announced that: (1) "the label 'jurisdictional'" should be used "only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority," "not for claim-processing rules" such as the filing deadline in § 2107; and (2) "courts should treat" "a statutory limitation" "as non-jurisdictional in character" when—as is the case with § 2107—"Congress does not rank [it] as jurisdictional." *See id.* at 217, 218 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004), and *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006)).

2. Petitioners here do not question *Bowles*' holding that noncompliance with § 2107 is a jurisdictional bar that appellate courts cannot equitably excuse. Instead, Petitioners emphasize two critical aspects of that holding.

First, the jurisdictional holding in *Bowles* heavily relied on this Court's traditional practice. *Bowles* repeatedly invoked the historical pedigree of the rule that it adopted. *See id.* at 206, 209-10. This was most apparent in the majority's rejoinder to the dissent's reliance on the reasoning of the *Kontrick-Arbaugh* line: "[g]iven the choice between calling into question some dicta in our recent opinions and effectively overruling a century's worth of practice, we think the former option is the only prudent course." *Id.* at 209 n.2. Likewise, in two unanimous decisions last Term, this Court reaffirmed that the jurisdictional holding in *Bowles* rests on this Court's "historical treatment of the type of limitation § 2107 imposes," *Reed Elsevier*, 130 S. Ct. at 1247-48, as reflected in "a long line of this Court's decisions left undisturbed by Congress," *id.* at 1250-51 (Ginsburg, J., concurring in part and concurring in the judgment); *Union Pac. R.R. Co.*, 130 S. Ct. at 597.

Second, *Bowles* trained on whether the Sixth Circuit could have retained the untimely appeal for adjudication of the merits, not on whether the Sixth Circuit could have disposed of that appeal in a manner that enabled a future timely appeal. While holding that appellate courts cannot resolve the merits of an untimely civil appeal because they lack the power to create equitable excuses for noncompliance with § 2107's jurisdictional time limit, *Bowles* did not consider whether such courts at least may equitably dispose of the putative appeal by entering a non-merits vacatur that prospectively cures the untimeliness. *See* 551 U.S. at 213-15. This Court did not reach that question for the simple reason that the parties failed to raise it. Yet had they done so, this Court would have discovered its

own well-established tradition of providing precisely such an equitable remedy.

B. In Jurisdictionally Improper Direct Appeals, This Court Has A Long And Unbroken Equitable Tradition Of Vacating And Remanding For Entry Of A Fresh Judgment From Which A Timely Appeal Can Be Taken To The Proper Circuit Court

1. Like all federal courts, this Court "always has jurisdiction to determine its own jurisdiction." *United States v. Ruiz*, 536 U.S. 622, 628 (2002) (citing *United States v. United Mine Workers*, 330 U.S. 258, 291 (1947)). And when the exercise of that threshold jurisdiction reveals "for any reason [that] the Court may not properly proceed with a case brought to it on appeal, or [that] it is without power to proceed with the appeal," "[i]t is a familiar practice of this Court that ... it may nevertheless, in the exercise of its supervisory appellate power, make such disposition of the case as justice requires." *Walling*, 321 U.S. at 676. As Justice Scalia has explained, such "matters of judicial administration and practice" are "reasonably ancillary to the [federal courts'] primary, dispute-deciding function." *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 21-22 (1994) (citing *Walling* and discussing the so-called *Munsingwear* practice of equitable vacatur when intervening mootness bars appellate review).

One of the "familiar practices" cited by *Walling* as an exemplar of this Court's "supervisory appellate power" to justly dispose of jurisdictionally barred appeals is this Court's equitable treatment of cases where the time for filing an appeal in the circuit

court has elapsed because the appellant has erroneously, albeit reasonably, taken a direct appeal to this Court instead. Specifically, "[w]hen [this Court] is without jurisdiction to decide an appeal which should have been prosecuted to another court" under an ambiguous jurisdictional statute—such that the jurisdictional time limit for appealing to the proper circuit court has since passed—this Court nevertheless "vacate[s] the judgment and remand[s] the cause in order to enable the court below to enter a new judgment from which a proper appeal may be taken" within the renewed jurisdictional time period. *See Walling*, 321 U.S. at 677.

As demonstrated below, Petitioners have identified at least 50 different cases from this Court, decided between 1934 and 1995, that implement this equitable practice of vacating the judgment below, notwithstanding the absence of appellate jurisdiction, solely in order to restart the clock for filing a jurisdictionally timely civil appeal. Indeed, almost all of the 36 Justices who were members of this Court during those 61 years have joined at least one opinion applying the practice—including a majority of the current Justices—and not a single Justice has ever questioned its legitimacy.

2. The practice of vacating and remanding to enable the filing of a jurisdictionally timely appeal was born in *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16 (1934) (*per curiam*). There, the plaintiff challenged a state tax assessment on federal constitutional grounds. *Id.* at 17. Under federal law at the time, certain federal challenges to state action could only be considered by a three-judge district court, and certain orders by such three-judge courts

were directly appealable to this Court. *See id.* at 17-18. In *Gully*, a three-judge district court was convened and entered a permanent injunction against the challenged assessment, at which point the state defendants took a direct appeal to this Court. *Id.* This Court held, however, that the plaintiff's challenge fell outside of the federal law that required the convocation of a three-judge court and that authorized a direct appeal. *Id.* at 18. Consequently, this Court lacked jurisdiction over the appeal. *Id.*

But this Court was acutely aware of the potential inequity created by its jurisdictional holding. Specifically, while the state officials could have "appeal[ed] [the injunction] to the Circuit Court of Appeals, notwithstanding the participation of three judges," such "relief [could no longer] be afforded ... as the time for appeal to that court ha[d] expired," and thus such an appeal had become jurisdictionally barred as well. *Id.* at 19; *see also* 28 U.S.C. § 230 (1934 ed. Supp. I). This Court determined that, "[i]n these circumstances"—where simply dismissing the improper appeal would create the inequitable result that a district court's judgment goes unreviewed due merely to jurisdictional confusion—"the appropriate action is to reverse the decree below," "without passing upon the merits," "and to remand the cause to the District Court for further proceedings" in which it reissues its order, thereby restarting the time period within which an appeal can be taken to the circuit court. *Gully*, 292 U.S. at 19.

A month later, this Court reaffirmed and clarified this equitable vacatur practice in *Oklahoma Gas & Electric Co. v. Oklahoma Packing Co.*, 292

U.S. 386 (1934). As in *Gully*, this Court first concluded that "[t]he three-judge procedure" had not been required below. *Id.* at 390-92. It emphasized that "[t]he issue [was] not one of the federal jurisdiction of the district court, ... but whether a final hearing by three judges was prescribed ... and hence whether this Court has jurisdiction to hear the appeal." *Id.* at 391. Having decided it was "without jurisdiction to hear the merits of the appeal," this Court explained that its threshold "exercise of its appellate jurisdiction" to determine jurisdiction included the "authority to ... frame [its] order in a way that will save to the appellants their proper remedies." *Id.* at 392. Appellants, "[b]y mistakenly appealing directly to this Court, ... ha[d] lost their opportunity to have the decree below reviewed on its merits, as the time for appeal to the Circuit Court of Appeals ha[d] expired." *Id.* Though this Court might have allowed that result "had the correct procedure ... been more definitively settled at the time the appeal ... was attempted," it held that, "in the[se] circumstances," "it is appropriate that the decree below should be vacated and the cause remanded to the district court for further proceedings." *Id.*

The equitable vacatur practice was soon so well settled that even Justice Frankfurter—a notorious stickler about the limits on the jurisdiction of federal courts[3]—unhesitatingly applied it when, once again, the unnecessary convocation of a three-judge court

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[3] *See, e.g.*, *Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448, 460 (1957) (Frankfurter, J., dissenting); *Nat'l Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting); *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., dissenting).

below was held to be "a fatal bar to ... entertaining [an] appeal." *See Phillips*, 312 U.S. at 248, 253. As Justice Frankfurter canonically explained:

> Had a timely appeal been taken to the circuit court of appeals[,] the decree below could have been reviewed there, though rendered by three judges.... While this Court cannot hear the merits, it will, where the question of jurisdiction was not obviously settled by prior decisions, [enter] an order framed to save appellants their proper remedies.... We therefore vacate the decree and remand the cause to the court which heard the case so that it may enter a fresh decree from which appellants may, if they wish, perfect a timely appeal to the circuit court of appeals.

Id. at 254.

3. As described above, this Court's practice of equitable vacatur to enable a timely circuit court appeal initially arose in cases where the non-obvious defect in this Court's appellate jurisdiction was that a three-judge court had not been required below.[4]

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[4] *See also Butler v. Dexter*, 425 U.S. 262, 267 (1976) (*per curiam*); *Dickson v. Ford*, 419 U.S. 1085 (1974); *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 99-101 (1974); *Bd. of Regents of Univ. of Texas Sys. v. New Left Educ. Project*, 404 U.S. 541, 545 (1972); *Moody v. Flowers*, 387 U.S. 97, 104 (1967); *Pa. Pub. Util. Comm'n v. Pa. R.R. Co.*, 382 U.S. 281, 282 (1965) (*per curiam*); *Rorick v. Bd. of Commr's of Everglades Drainage Dist.*, 307 U.S. 208, 212-13 (1939); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 173-74 (1939) (*per curiam*); *Int'l Ladies' Garment Workers Union v. Donnelly Garment Co.*, 304 U.S. 243, 251-52 (1938) (*per curiam*); *Wall v. McNee*, 296 U.S. 547, 548 (1935) (*per curiam*).

But the practice was and is by no means limited to that context. To the contrary, it has been equally applied in a variety of situations where the unsettled defect in this Court's appellate jurisdiction that had the effect of preventing a timely circuit court appeal was not tied to any mistake in the district court.

For example, this Court has employed the equitable vacatur practice to facilitate a timely circuit court appeal where its own appellate jurisdiction was lacking because: (1) a three-judge court was properly convened but the specific order at issue was not directly appealable to this Court;[5] (2) a district court declined to enter its order as a three-judge court;[6] (3) the decision of a single-judge district court narrowly interpreted a federal law in light of constitutional concerns and thus fell outside a provision conferring direct appellate jurisdiction in this Court for decisions actually holding federal statutes to be unconstitutional;[7] or (4) Congress had impliedly repealed a provision conferring direct appellate jurisdiction in this Court for certain cases from the District of Columbia.[8] There are also a

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[5] *See Castro Cnty. v. Crespin*, 101 F.3d 121, 124-25 (D.C. Cir. 1996) (discussing *Franklin v. Lawrimore*, 516 U.S. 801 (1995), and *Clinton v. Jeffers*, 503 U.S. 930 (1992)); *see also MTM, Inc. v. Baxley*, 420 U.S. 799, 802-04 (1975) (*per curiam*); *Mitchell v. Donovan*, 398 U.S. 427, 429-32 (1970) (*per curiam*); *Rockefeller v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 397 U.S. 820 (1970) (*per curiam*).

[6] *See Perez v. Ledesma*, 401 U.S. 82, 86-88 (1971); *Mengelkoch v. Indus. Welfare Comm'n*, 393 U.S. 83 (1968) (*per curiam*); *Wilson v. City of Port Lavaca*, 391 U.S. 352 (1968) (*per curiam*).

[7] *See United States v. Christian Echoes Nat'l Ministry*, 404 U.S. 561, 563-66 (1972) (*per curiam*).

[8] *See United States v. Belt*, 319 U.S. 521 (1943).

number of equitable vacatur cases where this Court's summary disposition does not itself explain the basis for the lack of appellate jurisdiction.[9]

This Court's equitable vacatur practice has not been employed as frequently in recent years as it was in the past, because, during the 1970's and 1980's, Congress repealed most of the statutes conferring direct appellate jurisdiction in this Court, thus eliminating much of the uncertainty about when appellate jurisdiction exists here. *See* Eugene Gressman et al., *Supreme Court Practice* § 2.7 (9th ed. 2007). But the equitable vacatur practice has not itself fallen into desuetude. For example, in 1995, the practice was applied by a unanimous Court that

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[9] *See Ayers v. Winter*, 467 U.S. 1211 (1984); *Burlington Northern, Inc. v. Sterling Colorado Beef Co.*, 429 U.S. 1084 (1977); *Stivers v. Minnesota*, 429 U.S. 1084 (1977); *Winters v. Lavine*, 429 U.S. 1012 (1976); *Gustafson v. Hoffman*, 429 U.S. 806 (1976); *Shouse v. Pierce Cnty.*, 425 U.S. 929 (1976); *Nat'l Socialist White People's Party v. Walsh*, 425 U.S. 929 (1976); *Rogers v. Inmates' Councilmatic Voice*, 422 U.S. 1031 (1975); *Democratic Exec. Comm. of Columbiana Cnty. v. Brown*, 422 U.S. 1002 (1975); *Smart v. Texas Power & Light Co.*, 421 U.S. 958 (1975); *Custom Recording Co. v. Blanton*, 421 U.S. 943 (1975); *BT Inv. Managers Inc. v. Dickinson*, 421 U.S. 901, 902 (1975); *Mendez v. Heller*, 420 U.S. 916 (1975); *Fitzgerald v. Digrazia*, 419 U.S. 1065 (1974); *Driskell v. Edwards*, 419 U.S. 812 (1974); *Daniel v. Waters*, 417 U.S. 963 (1974); *Webster v. Perry*, 417 U.S. 963 (1974); *Edelman v. Townsend*, 412 U.S. 914, 915 (1973); *Smith v. Garza*, 401 U.S. 1006 (1971); *Bd. of Pub. Instruction v. Banks*, 401 U.S. 988 (1971); *Hutcherson v. Lehtin*, 400 U.S. 923 (1970); *Carlough v. Richardson*, 399 U.S. 920 (1970); *Sumrall v. Kidd*, 394 U.S. 215 (1969) (*per curiam*); *Dahl v. Republican State Comm.*, 393 U.S. 408 (1969) (*per curiam*); *Stamler v. Willis*, 393 U.S. 407 (1969) (*per curiam*); *Skolnick v. Bd. of Comm'rs*, 389 U.S. 26 (1967) (*per curiam*); *Canton Poultry, Inc. v. Conner*, 388 U.S. 458 (1967) (*per curiam*).

included a majority of the current Justices—namely, Justices Scalia, Kennedy, Thomas, Ginsburg, and Breyer. This Court did so to enable a timely circuit court appeal of an attorneys' fee issue, where the appellants had erroneously invoked a broadly worded direct appeal provision in a federal voting rights law, thereby causing the time for appealing the fee issue to the Fourth Circuit to elapse. *See Franklin*, 516 U.S. at 801; *Crespin*, 101 F.3d at 124-25. Indeed, this Court provided the equitable vacatur relief *sua sponte*, because the appellants in *Franklin* did not even respond to the appellees' motion to dismiss.

4. Congress, moreover, has ratified the legitimacy of the equitable vacatur practice. This Court's rule is that "Congress ratifie[s]" a "well-established judicial interpretation" when it "leave[s] [it] intact" while "comprehensively revis[ing]" a relevant statutory scheme. *See, e.g., Herman & MacLean v. Huddleston*, 459 U.S. 375, 384-86 (1983). And that is precisely what happened with respect to the equitable vacatur practice.

As noted, the vacatur practice is an exercise of this Court's "supervisory appellate power" to "dispos[e] of [a] case as justice requires" even when "it is without power to proceed with the appeal" on the merits. *Walling*, 321 U.S. at 676. At the time *Gully* adopted the practice in 1934, the Congressional statute governing this Court's supervisory power read as follows:

> The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a district court lawfully brought before it for review, or may direct such judgment, decree,

> or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require....

28 U.S.C. § 876 (1934 ed. Supp. I); *see also* Rev. Stat. § 701 (1875 ed.). Between 1934 and 1948, this Court applied the equitable vacatur practice at least 8 times. *See supra* at 12-15, 15 n.4, 16 n.8.

Then, in 1948, Congress comprehensively revised Title 28 of the U.S. Code. *See* Pub. L. No. 80-773, ch. 646, 62 Stat. 869. In doing so, Congress made two material changes—italicized below—to the provision that governed (and still governs) this Court's "supervisory appellate power":

> The Supreme Court *or any other court of appellate jurisdiction* may affirm, modify, *vacate, set aside* or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 2106 (emphases added).

If Congress had merely "le[ft] ... intact" the equitable vacatur practice that this Court had already established, that itself would have been sufficient to establish statutory ratification of the remedy. *Huddleston*, 459 U.S. at 386. But Congress went further still, for the two material changes that it did make affirmatively support the legitimacy of the remedy and its applicability here: *first*, Congress confirmed the power to "vacate" or "set aside" the judgment under review; and *second*, Congress confirmed that circuit courts, no less than this Court,

possess supervisory appellate power over cases before them.

Accordingly, while *Bowles* properly noted that "Congress may authorize courts to promulgate rules that excuse compliance" with § 2107 if displeased with the result there, *see* 551 U.S. at 214, this Court was not informed that Congress has *already* authorized equitable vacaturs that prospectively cure noncompliance with § 2107, by "le[aving] undisturbed" the "long line of this Court's decisions" employing the vacatur practice, *Reed Elsevier*, 130 S. Ct. at 1251 (Ginsburg, J., concurring in part and concurring in the judgment).

5. To be sure, this Court's longstanding practice of "vacat[ing] the district court judgment and remand[ing] the case for the entry of a fresh decree from which [a timely] appeal may be taken" is not "statutorily or otherwise compelled." *Norton v. Mathews*, 427 U.S. 524, 531 (1976). It is purely an equitable exercise, in "cases where the jurisdictional issue was previously unsettled," *id.*, of this Court's "supervisory appellate power," *Walling*, 321 U.S. at 676. But it is striking how freely this Court has dispensed such equity when reasonable mistakes would otherwise have led to the result that an appellant was jurisdictionally foreclosed from filing a timely appeal in a circuit court.

First, Petitioners have identified at least 50 different cases over 60 years in which this Court has protected appellants from the consequence of their reasonable jurisdictional errors. *See supra* at 12-17 & nn.4-9. Indeed, during that period, 36 different Justices have been members of this Court, 30 of them have joined at least one opinion employing the

equitable vacatur practice—including a majority of the current Justices—and no Justice has ever questioned the practice, let alone has this Court ever held that it should not be used.

Second, this Court has set a relatively low bar for entitlement to such equitable relief. It has granted vacatur so long as "the question of jurisdiction was not obviously settled by prior decisions." *Phillips*, 312 U.S. at 254. Thus, while mistaken appellants have received relief when they reasonably relied on settled precedent that was subsequently abrogated, *see, e.g.*, *Gonzalez v. Automatic Emps. Credit Union*, 419 U.S. 90, 95, 99-101 (1974); *Pa. Pub. Util. Comm'n v. Pa. R.R. Co.*, 382 U.S. 281, 282 (1965) (*per curiam*), they also have received relief simply because the jurisdictional question had been open, *see, e.g.*, *Bd. of Regents of Univ. of Texas Sys. v. New Left Educ. Project*, 404 U.S. 541, 543-45 (1972); *Okla. Gas & Elec. Co.*, 292 U.S. at 390-92.

Finally, this Court has provided equitable vacatur relief even if the mistaken appellant failed to ask for such relief. Based on the available briefing from the 50 cases cited herein, Petitioners are aware of only 5 cases where the putative appellant affirmatively requested vacatur if this Court was barred from reaching a decision on the merits.[10]

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[10] *See* Appellants' Supplement to Jurisdictional Statement at 2, *Clinton v. Jeffers*, 503 U.S. 930 (1992) (No. 91-1210); Jurisdictional Statement at 9-10, *Gustafson v. Hoffman*, 429 U.S. 806 (1976) (No. 75-1672); Brief in Opposition to the Motion to Dismiss at 7, *United States v. Belt*, 319 U.S. 521 (1943) (No. 919); Brief of Appellants at 25, *Phillips v. United States*, 312 U.S. 246 (1941) (No. 201); Brief for Appellant at 26, *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939) (No. 717).

Indeed, in at least two cases where the appellant did not raise the vacatur remedy until after this Court had issued an opinion simply dismissing the appeal, this Court took the extraordinary step of withdrawing the opinion and replacing it with one that granted the vacatur remedy. *See Hutcherson v. Lehtin*, 400 U.S. 923 (1970); *Stamler v. Willis*, 393 U.S. 407 (1969) (*per curiam*).

C. The Courts Of Appeals Should Be Allowed To Invoke The Equitable Tradition Of Vacating And Remanding For Entry Of A Fresh Judgment When A Jurisdictionally Untimely Appeal Is Caused By A Judicial Error

This Court's vacatur practice in its direct appeal jurisprudence proves that a court lacking appellate jurisdiction is not powerless to provide an equitable remedy that prospectively cures reasonable noncompliance with a jurisdictional time limit for taking an appeal. And it follows *a fortiori* that the Courts of Appeals should be able to apply the same practice when reasonable reliance on judicial error causes an appellant's noncompliance with the jurisdictional time limit in § 2107.

First, there is no material distinction between the appellants in this Court's equitable vacatur cases and appellants like Petitioners and Bowles. In both situations, a putative appellant has missed the jurisdictional time limit for taking an appeal to the circuit court that has proper appellate jurisdiction. In both situations, the cause of that untimeliness is that the judiciary has failed to provide unambiguous and correct guidance on the relevant jurisdictional rules. And in both situations, a court that lacks appellate jurisdiction to resolve the case on the

merits still retains supervisory appellate power to dispose of the case justly, including by vacating and remanding for entry of a fresh judgment that will restart the time for taking an appeal.

Second, the Courts of Appeals arguably have *greater* justification for awarding such relief than does this Court in its direct appeal jurisprudence. After all, the Ninth Circuit here is at least the federal appellate court that has statutory appellate jurisdiction over a case of this type, *see* 28 U.S.C. § 1291, even if it cannot exercise that jurisdiction due to Petitioners' noncompliance with the time limit in § 2107. By contrast, in this Court's equitable vacatur cases, this Court is not even the correct appellate court to review the district court's judgment, *see* 28 U.S.C. §§ 1253, 1254, yet it still provides relief. To put the matter differently, if this Court's complete lack of appellate jurisdiction does not prevent it from providing equitable vacatur relief that facilitates a timely appeal in the Ninth Circuit, then surely the Ninth Circuit's limited lack of appellate jurisdiction here does not prevent it from providing the same relief. Indeed, it would be absurd if Petitioners would have been better off missing § 2107's time limit by mistakenly filing a direct appeal in this Court, rather than by reasonably relying on Ninth Circuit precedent construing § 2107 that this Court subsequently abrogated.

Third, untimely appellants who have reasonably relied on judicial error have a far greater equitable claim to vacatur relief than many of the mistaken appellants in this Court's vacatur cases. Unlike Petitioners, who relied on controlling precedent that was later overruled, *see supra* at 2-4, or Bowles, who

relied on an order of a federal judge that was in error, *see supra* at 7-8, the mistaken appellants in this Court's vacatur cases often simply made the wrong choice when confronted with an unresolved jurisdictional question, *see supra* at 21. Indeed, prudent appellants in those circumstances could have filed a protective appeal in the circuit court, *see, e.g.*, *Pa. Pub. Util. Comm'n*, 382 U.S. at 282, whereas appellants like Petitioners and Bowles had no reason to doubt the timeliness of their appeals, which complied with binding judicial decrees.

Finally, this Court's equitable vacatur practice for prospectively curing jurisdictionally defective appeals is a more established tradition than was the tradition cited in *Bowles* of treating statutory time limits for appealing as jurisdictional in the first place. *Bowles* cited a mere seven cases from this Court to establish the practice of treating the civil appeal time limit as jurisdictional. *See* 551 U.S. at 209-10. Some have questioned whether all seven cases fully supported that conclusion. *See* Scott Dodson, *The Failure of* Bowles v. Russell, 43 Tulsa L. Rev. 631, 635-38 (2008). Regardless, however, those seven cases pale in comparison to the 50 different cases cited above in which 30 different Justices of this Court have repeatedly demonstrated that courts lacking appellate jurisdiction still possess the power to award equitable non-merits relief that prospectively cures a jurisdictionally untimely appeal. Given that this Court relied so heavily on tradition in *Bowles* when treating statutory time limits for appeals as jurisdictional, it should now readily reaffirm and embrace the much more established appellate tradition of providing equitable

vacatur relief that prospectively cures jurisdictionally untimely appeals.[11]

II. THIS IMPORTANT ISSUE OF FEDERAL JURISDICTIONAL PRACTICE WARRANTS THIS COURT'S IMMEDIATE RESOLUTION

This Court has often granted certiorari in order to "exercise ... [its] supervisory powers," *Nguyen v. United States*, 539 U.S. 69, 73-74 (2003), "in cases involving [issues of] federal jurisdiction, practice, and procedure" that are of sufficient "importance," Gressman, *supra*, § 4.15 at 273. For at least two reasons, this case warrants such treatment.

First, in recent years, this Court has increasingly recognized the importance of reviewing jurisdictional holdings, even in the absence of a circuit split, when those holdings would deprive litigants of their right to invoke equity or to waive defenses. *Bowles* itself was precisely such a case. *See* 551 U.S. at 207-08. And so is *Henderson v. Shinseki*, 130 S. Ct. 3502 (2010), in which this Court is currently reviewing the Federal Circuit's extension of *Bowles* to untimely appeals in Veterans Court, belated filings which often present compelling equitable justifications from disabled soldiers.

Reed Elsevier perhaps best exemplifies the vigor with which this Court has reviewed potential over-reliance by lower courts on a "jurisdictional" characterization. There, the Second Circuit had refused to allow a settlement of a copyright class-

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[11] Notably, it does not appear that any of the seven "jurisdictional" cases cited in *Bowles* involved circumstances that would have called for an exercise of this Court's equitable vacatur practice. *See* Dodson, *supra*, at 635-38.

action, reasoning that some of the settled claims involved unregistered copyrights despite "widespread agreement among the circuits" that the registration requirement was a "jurisdictional" bar to copyright claims. *See* 130 S. Ct. at 1242-43. Perhaps because of that "widespread agreement," the petitioners in seeking certiorari did not even dispute that the registration requirement was jurisdictional, instead arguing merely that federal courts can enter comprehensive settlements even if some of the settled claims would have been jurisdictionally barred had they been litigated on the merits. *See* Petition for a Writ of Certiorari at i, 11-31, *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010) (No. 08-103). Despite the failure of the petitioners to raise the issue, however, this Court *sua sponte* "formulated the question presented to ask whether [the registration requirement] restricts the subject-matter jurisdiction of the federal courts over copyright infringement actions," and it then proceeded to overrule the "widespread agreement among the circuits" that the requirement was jurisdictional. *See* 130 S. Ct. at 1243-47. Notably, this Court also took that self-created opportunity to distinguish and cabin *Bowles* based on this Court's traditional treatment of § 2107. *See id.* at 1247-48; *see also id.* at 1250-51 (Ginsburg, J., concurring in part and concurring in the judgment).

Here, as in *Bowles*, *Henderson*, and *Reed Elsevier*, the need for "an exercise of this Court's supervisory powers" is critical. *Nguyen*, 539 U.S. at 74. This Court should reaffirm an important principle of federal jurisdictional practice that its decision in *Bowles* has unfortunately obscured: the lack of "power to proceed with [an] appeal" does not

strip a court of its "supervisory appellate power" to "dispos[e] of the case as justice requires." *Walling*, 321 U.S. at 676.

Second, the omission in the parties' briefing in *Bowles* caused this Court to effect a significant alteration in the legal landscape based, unwittingly, on a "'less than accurate' historical analysis" that "contradicted an 'unbroken line of decisions,'" which is the type of oversight that justifies reviewing the scope of recent precedent. *See United States v. Dixon*, 509 U.S. 688, 711-12 (1993) (quoting *Solorio v. United States*, 483 U.S. 435, 439, 442 (1987)); *see also Eberhart v. United States*, 546 U.S. 12, 13-15, 19-20 (2005) (*per curiam*) (granting certiorari when the Seventh Circuit's erroneous belief that it was required to treat a rule as "jurisdictional" was "an error shared among the circuits ...[and] caused in large part by imprecision in [this Court's] prior cases"). Prior to *Bowles*, equitable relief from § 2107 was available under the "unique circumstances" doctrine. *See Bowles*, 551 U.S. at 213-14. To be sure, that doctrine was technically an "illegitimate" means of dispensing equity since it permitted a merits adjudication while purporting to excuse noncompliance with a jurisdictional rule. *See id.* at 214. That defect in form, however, could have been fixed in *Bowles* if only this Court had been made aware of its legitimate and longstanding tradition of using vacatur as a non-merits disposition that prospectively cures a jurisdictionally untimely appeal. But because this Court instead was presented with the false dichotomy between dismissing the untimely appeal or allowing its adjudication on the merits, it felt constrained to affirm the Sixth Circuit's "inequitable" dismissal of

Bowles' appeal. *See id.* at 214-15. That unfortunate perception in turn led the Ninth Circuit here wrongly to believe that "dismissal of [Petitioners'] appeal[]" was "require[d]" and that "remand would be futile." Pet.App. 2a-3a. This Court should seize the opportunity to fix the misperception created as a result of the inadequate briefing in *Bowles*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and STATE OF CALIFORNIA, *ex rel.* Dr. KATHERINE R. O'CONNELL; et al., Plaintiffs – Appellants, and DANIEL ROBERT BARTLEY, Realtors' Counsel, Appellant, v. CHAPMAN UNIVERSITY, Defendant – Appellee.	No. 07-56864 D.C. No. CV-04-01256-PSG Central District of California, Los Angeles

FILED

AUG 17 2010

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA and STATE OF CALIFORNIA, *ex rel* Dr. KATHERINE R. O'CONNELL; et al., Plaintiffs – Appellees, and	No. 08-55275 D.C. No. CV-04-01256-PSG Central District of California, Santa Ana

DANIEL ROBERT BAILEY, Realtors' Counsel, Appellee, v. CHAPMAN UNIVERSITY, Defendant – Appellant.	ORDER

Before: REINHARDT, TASHIMA and WARDLAW, Circuit Judges.

Realtors Drs. Katherine O'Connell, Chris Moyers, and Carlee Durfor ("Realtors") appeal from the entry of summary judgment in favor of Chapman University ("Chapman"). Chapman appeals from the district court's denial of a request for a fee or sanction award.

These consolidated appeals were stayed pending the issuance of the mandate in *United States ex rel. Haight v. Catholic Healthcare West*, 602 F.3d 949 (9th Cir. 2010), which acknowledged the overruling of prior Ninth Circuit precedent by the Supreme Court's decision in *United States ex rel. Eisenstein v. City of New York*, 129 S. Ct. 2230 (2009). In *Eisenstein*, the Supreme Court determined that in False Claims Act *qui tam* actions in which the United States has declined to intervene, the 30-day period for filing a notice of appeal applied, rather than the extended 60-day period applicable in actions involving the United States as a party.

Eisenstein applies retroactively and requires dismissal of these appeals. *See* 129 S. Ct. at 2236

n.4; *Haight*, 602 F.3d at 953. Relators' notice of appeal was filed on December 21, 2007, 58 days after the October 24, 2007 entry of summary judgment in favor of Chapman. Chapman's notice of appeal was filed on February 7, 2008, 47 days after the December 12, 2007 entry of judgment denying Chapman's motion for fees or sanctions.

Haight forecloses Relators' request for relief from this court pursuant to Federal Rules of Appellate Procedure 2, 4 and 26. *Id.* at 956. *Haight* also conclusively determines Relators' claim that the change in law wrought by *Eisenstein* violates due process. *Id.* at 954. Finally, because the district court is prohibited from construing Relators' notice of appeal as a motion for an extension of time to file a notice of appeal, remand would be futile and we decline to do so. *See id.* at 957, citing *Pettibone v. Cupp*, 666 F.2d 333, 335 (9th Cir. 1981).

Accordingly, Relators' "Motion for Rule 4(a)(5)(A)(ii) Relief" is denied and Chapman University's motion to dismiss is granted.

Relators' counsel's appeal from the district court's order denying the "Motion for Rule 76(a) Ruling Setting Aside as Erroneous the Magistrate Judge's Order Assessing Monetary Sanctions Against Relators' Counsel," part of appeal No. 07-56864, was timely filed. Within 21 days of the date of this order, Relators' counsel shall move for voluntary dismissal or file a notice that he intends to prosecute this appeal. Failure to comply with this order will result in the automatic dismissal of this appeal by the Clerk for failure to prosecute. *See* 9th Cir. R. 42-1.

APPEAL NO. 07-56864 DISMISSED in part; APPEAL NO. 08-55275 DISMISSED in its entirety.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES — GENERAL

Case No.	SA CV 04-1256 PSG (RCx)	Date	October 23, 2007
Title	United States of America and State of California, *ex rel.* Dr. Katherine O'Connell, et al v. Chapman University, *et al.*		

Present:	The Honorable Philip S. Gutirrez, United States District Judge

Wendy K. Hernandez	Not Present	n/a
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiff(s): Not Present	Attorneys Present for Defendant(s): Not Present

Proceedings: (In Chambers) Order GRANTING Defendant's Motion for Summary Judgment

Presently pending before the Court is Defendant Chapman University's ("Chapman" or "Defendant") Motion for Summary Judgment, or in the alternative, Partial Summary Judgment or For an Order Specifying Material Facts Without Substantial

Controversy.[1] After considering the moving and opposing papers, as well as oral arguments at the hearing on October 22, 2007, the Court hereby GRANTS Defendant's Motion for Summary Judgment.

I. BACKGROUND

A. The Parties

Defendant Chapman is an institution of higher learning offering undergraduate, graduate and professional programs at its campus in Orange, California. (Motion at 1.) Chapman also offers working adults a range of bachelors degrees, master's degrees and teaching credentials through its University College academic centers. (Id.) Chapman currently operates 27 academic centers in California and Washington, 7 of which are located on military installations. (Warner Dec. ¶ 3.)

Plaintiffs in this action are Dr. Katherine O'Connell, Dr. Carlee Durfor and Dr. Chris Moyers (collectively "Relators"), all former adjunct faculty who taught at Chapman's academic centers.

B. Federal Financial Assistance Programs

Chapman participates in Federal Student Financial Assistance ("FSFA") program under Title IV of the Higher Education Act ("HEA"), 20 U.S.C. § 1070, *et seq.* Pursuant to the HEA, educational institutions like Chapman, who wish to receive federal subsidies under Title IV, must enter into a Program Participation Agreement ("PPA") with the

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[1] Both Plaintiff and Defendant have submitted requests for judicial notice. The Court denies these requests, finding them unnecessary for a decision on the merits.

Department of Education ("DOE"). (Ball Dec. ¶ 4; Exs. A-E.) Each PPA expressly incorporates the HEA statutory language conditioning a school's "initial and continuing" eligibility to receive Title IV funds on compliance with the HEA statutory requirements, including the requirement that the institution be regionally accredited. 34 C.F.R. § 668.14(b)(23). If an institution violates the PPA, the DOE may terminate the school's eligibility to participate in the programs for "failure to demonstrate administrative capability." 34 C.F.R. §§ 668.14, 668.16. These programs include the Pell Grant, 20 U.S.C. § 1070a, Perkins Loan, 20 U.S.C. § 1087aa, College Work Study, 42 U.S.C. § 2751, Supplemental Educational Opportunity Grant, 20 U.S.C. § 1070b, and the Guaranteed Student Loan Programs, 20 U.S.C. §§ 1070a, 1078-2 and 1078. (Ball Dec. Exs. A-E.)

1. Accreditation

20 U.S.C.A. § 1094(a)(21) requires educational institutions receiving Title IV funds to "meet the requirements established by the Secretary and accrediting agencies or associations . . ." The DOE recognizes only those accrediting associations that demonstrate standards for accreditation "that are sufficiently rigorous to ensure that the agency is a reliable authority regarding the quality of the education or training provided by the institutions or programs it accredits." 34 C.F.R. 602.16(a); 20 U.S.C. § 1099b. Chapman, which has been accredited continually since 1956, is accredited by the Accrediting Commission for Senior Colleges and Universities of the Western Association of Schools and Colleges ("WASC"), one of six regional

accreditation associations recognized by the DOE. (Fite Dec. ¶¶ 3, 5.) WASC first accredited Chapman in 1962, and conducted its most recent accreditation review in 2005, reaffirming Chapman's accreditation for an additional eight years. (Fite Dec. ¶ 5, Ex. A.)

2. WASC Accreditation Process

WASC's current accreditation process involves a three-stage, sequential institutional review process. (Fite Dec., Ex. B at D 027380.) An educational institution receives a status of accreditation only if WASC determines it has:

1. Demonstrated that it meets the Core Commitments to Institutional Capacity and Educational Effectiveness;
2. Conducted a self-review under the Accreditation Standards, developed and presented indicators of institutional performance, and identified areas for needed improvement to serve as an evidentiary basis for completing successfully the three-stage process of institutional review;
3. Developed an approved Institutional Proposal for Accreditation Review, and been evaluated by teams of external evaluators in the Preparatory and Educational Effectiveness Review Processes;
4. Demonstrated to the Commission that it meets or exceeds the expectations of the Accreditation Standards; and
5. Committed itself to institutional improvement, periodic self-evaluation, and continuing compliance with Commission Standards, Policies, Procedures and Decisions.

(Id. at D 027387.) Once WASC concludes that an institution meets its standards, it grants accreditation for a specified period of time, and continuing accreditation depends on periodic reevaluations by WASC. (Fite Dec., Ex. B at D 027408-027423, Ex. C at D 017475-017476.) If WASC determines an institution does not meet its standards, it may impose an array of formal sanctions, including issuing warnings, imposing probation, issuing an order to show cause, or terminating accreditation. (Id., Ex. B at D 027425.) WASC must allow the institution up to two years to correct the failure. (Id. at D 027427.)

B. State Financial Assistance Programs

The State of California offers Cal Grants to qualifying California students under a program administered by the California Student Aid Commission ("CSAC"). Cal. Ed. Code § 69535. In order to participate in California student grant programs, an institution must sign an Institutional Participation Agreement ("IPA"), in which it certifies that it participates in two of three campus based federal student programs, and that its students participate in the Federal Pell Grant program. Cal. Ed. Code §§ 69432.7(*l*),69535(*l*).

C. United States Department of Defense Programs

The United States Department of Defense ("DOD") also has programs for payment of tuition for qualifying students, via the GI Bill and the Armed Forced Tuition Assistance Program, a benefit for eligible members of the Army, Navy, Marines, Air Force and Coast Guard. Chapman contracts with several military installations to provide on-base

teaching. (Warner Dec. ¶ 4.) These programs are governed by individual Memoranda of Understanding ("MOU's") which usually contain a contractual obligation that Chapman "maintain full accreditation with all regional accrediting associations, as applicable." (Warner Dec. ¶ 4; Bartley Dec. Ex. 15 at D 8157; see also Exs. 16-30.) In particular, the Air Force's MOU requires Chapman to adhere to Air Force "Quality Educational Standards," including the following:

> Classroom contact hours will be at least 45 hours per 3 semester hour course (or quarter hour equivalent) or in a format the equates to the traditional Carnegie unit of instruction — 45 total hours equaling 1 semester hour of credit (normally 15 class contact hours plus 30 hours of study/research outside the classroom).
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> Key Areas of Concern:
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> 1. Inadequate classroom contact hours.
> 2. Inadequate hours of assigned outside study/research.

(Bartley Dec. Ex. 15 at D 7233.) The U.S. Navy and the U.S. Army MOU's contain similar contractual language requiring Chapman to adhere to course descriptions set forth in its course catalogs and schedules. (Bartley Dec. Exs. 27-20.)

D. The Second Amended Complaint

On September 28, 2004, Relators filed a *qui tam* whistleblower action against Chapman.[2] The

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[2] Under the False Claims Act, a private individual (a "relator") may bring an action (referred to as a "*qui tam* action") on behalf of the United States against any individual or company who

Complaint alleged two causes of action under the Federal False Claims Act ("FCA"), two causes of action under the California False Claims Act ("CFCA") (collectively "FCA claims"), and one cause of action under the California Unfair Competition Law ("UCL"). On April 3, 2006, Relators filed a Second Amended Complaint ("SAC"), adding two new claims for injury and damages for employment retaliation in violation of 31 U.S.C. § 3730(h), and for employer interference with employee disclosure and retaliation in violation of Cal. Gov. Code § 12653.

In the SAC, Relators allege that "Chapman University, via express and implied certification, regarding the number of classroom hours being taught to students, [obtained] hundred of millions of dollars in student tuition funding annually from the United States Department of Education and the United States Department of Defense, from at least October 18, 1994 through the present." (SAC ¶ 2.) Specifically, Relators alleged that "incident to requesting and receiving hundreds of millions of dollars in federal and state funding annually, [Chapman] falsely certified to the United States of America and the State of California, every year, that they are in compliance with federal provisions requiring that instruction meet certain minimum clock-hour requirements." (SAC ¶ 6.) Relators allege that WASC requires Chapman to maintain:

> a program of General Education that is integrated throughout the curriculum including the upper division level, consisting

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has knowingly presented a false or fraudulent claim to the United States government.

> of a minimum of 45 hours semester credit hours (or the equivalent), together with a significant study in depth in a given area of knowledge (typically described in terms of a major).

(SAC ¶ 24.) According to Relators, WASC's definition of "unit of credit" sets forth the minimum requirement of 45 hours. (SAC ¶ 24.) The SAC alleges that certain officials at Chapman had actual knowledge of these false certifications, or acted with deliberate indifference and/or reckless disregard as to the truth or falsity of the claims. (Id., ¶ 7.)

On May 23, 2006, the Court dismissed Relators' unfair competition, employment retaliation and employer interference claims. The Court also limited Relators to a "false certification" theory of liability with respect to the four, remaining federal and California FCA claims (Counts 1-4). Chapman now moves for summary judgment, or in the alternative partial summary judgment or for an order specifying material facts without substantial controversy.

II. LEGAL STANDARD FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) establishes that summary judgment is proper only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the

moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. *Id.* at 257.

A non-moving party who bears the burden of proving at trial an element essential to its case must sufficiently establish a genuine dispute of fact with respect to that element or face summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S, Ct. 2548 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *Anderson*, 477 U.S. at 250-51.

If the moving party seeks summary judgment on a claim or defense for which it bears the burden of proof at trial, the moving party must use affirmative, admissible evidence. Admissible declarations or affidavits must be based on personal knowledge, must set forth .facts that would be admissible evidence at trial, and must show that the declarant or affiant is competent to testify as to the facts at issue. Fed. R. Civ. P. 56(e).

III. DISCUSSION

Relators allege four types of false certification: (1) false certifications to WASC about compliance with class hour accreditation standards (SAC ¶ 42); (2) false certifications in the PPA that Chapman meets WASC accreditation standards (SAC ¶ 43); (3) false certifications in the MOUs about compliance with the WASC standards (SAC ¶ 44); and (4) false certifications to CSAC about compliance with WASC standards (SAC ¶ 45).

The purpose of the False Claims Act is "to provide for restitution to the government of money taken from it by fraud." *United States v. Hess*, 317

U.S, 537, 551, 63 S,Ct. 379 (1943). The FCA imposes liability on one who "knowingly presents" to the United States government "a false or fraudulent claim for payment." 31 U.S.C. §§ 3729(a); 3730(b)(1). Under the false certification theory, FCA liability may be found where a party falsely certifies compliance with a statute or regulation that is a condition of receiving a government benefit, followed by receipt of the benefit based on the false certification. *U.S. ex rel. Hendow v. University of Phoenix*, 461 F.3d 1166, 1171 (9th Cir. 2006). Establishing a prima facie case of false certification requires a plaintiff to prove: (1) a false statement or fraudulent course of conduct, (2) made with scienter, (3) that was material, causing (4) the government to payout money or forfeit moneys due. *Hendow*, 461 F.3d 1171 (citations omitted).

Like the federal FCA, the California FCA imposes liability on any person who "knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval." Cal. Gov't Code § 12651. Since California's FCA is patterned on the federal statutory scheme, the requirements for state liability are the same as for federal liability. *See State ex rel. Grayson v. Pac. Bell Tel. Co.*, 142 Cal.App.4th 741, 747 n.3 (2006); *see also United States v. Shasta Servs., Inc.*, 440 F.Supp.2d 1108, 1111 (E.D.Cal. 2006).

A. Federal FCA Claim

1. False Statement

(a) Federal Student Financial Assistance Program

The first element of a false certification claim requires Relators to prove the existence of a false statement or fraudulent course of conduct. *Hendow*, 461 F.3d at 1171. Relators contend that through WASC's accreditation, Chapman falsely certified its compliance with HEA requirements via its PPA's, via its annual audit reports to the DOE, and via its IPA's to the CSAC. (Opp'n at 3.) Relators' theory is that the accreditation information contained in these documents is false, because Chapman has not complied with the Carnegie standard of hours, the commonly accepted uniform measure of a academic achievement in the U.S. According to Relators, the Carnegie hour consists of 50 minutes of faculty-student contact time coupled with an adjacent 10 minute break. (Amended Opp'n at 12.)[3] Thus, a 3-credit course entails 45 Carnegie hours. (Id.) Relators contend that DOE requires strict adherence with the Carnegie hour, and the Chapman failed to comply with the Carnegie hour by its "systematic and chronic practice" of permitting its faculty members to close classes early where the professor elects to teach a multi-hour class without breaks, to justify counting clock hours in 50-minute increments.

In response, Chapman contends the accrediting agency, WASC, has no requirement of a quantum of classroom hours. Therefore, Relators cannot

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[3] In explaining the Carnegie standard, Relators cite to Ex. F, an article entitled "The History of the Student Credit Hour," attached to their request for judicial notice. The Court finds no mention in Exhibit F of the Relators' statements regarding the Carnegie standard. However, other exhibits, such as Ex. 11 attached to the Bartley Dec., support Relators' definition of the Carnegie hour.

establish a false statement that is a condition of government funding. As support for its contention, Chapman cites *U.S. ex rel Diop v. Wayne County Community College Dist.*, 242 F.Supp.2d 497 (E.D.Mich.2003), where the court, addressing this very issue, granted summary judgment in favor of the defendant community college.[4]

In *Diop*, the plaintiff claimed a community college falsely certified compliance with FSFA provisions when the college chancellor stated, "I hereby certify that, to the best of my knowledge and belief, all information in this document is true and correct." *Id.* at 523. Relying on 20 U.S.C. § 1094, which requires an institution participating in the FSFA program to meet the requirements established by the accrediting agencies, plaintiff argued that the college's accreditation information in its FSFA application was false.[5] *Id.* Specifically, plaintiff

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[4] In his Order Granting in Part and Denying in Part Defendant's Motion to Dismiss the Second Amended Complaint, Judge Selna declined to consider *Diop* because it dealt with a motion for summary judgment. (See May 23, 2006 Minute Order at 5, fn. 2.) As we are now at the summary judgment stage of litigation, the Court finds *Diop* appropriate for discussion.

[5] 20 U.S.C.A. § 1094(a)(21) provides that the PPA agreement shall:

. . .condition the initial and continuing eligibility of an institution to participate in a program upon compliance with the following requirements:

. . .

(21) The institution will meet the requirements established by the Secretary and accrediting agencies or associations, and will provide evidence to the Secretary that the institution has the authority to operate within a State.

claimed that because the chemistry labs were ill-equipped and lacked adequate materials, the college could not be properly accredited. *Id.*

The *Diop* court rejected plaintiff's argument, reasoning that 20 U.S.C. § 1094 expressly delegates the task of insuring the educational viability of institutions of higher education to private accreditation agencies. *Id.* The court found that nothing in the accreditation statute required the college to have ascertained whether the accrediting agency considered the adequacy of the chemistry labs in granting accreditation. *Id.* Importantly, the court declined to be put in the position of determining whether the education offered to the college's students was adequate, since doing so would usurp the statutory role of the accrediting agency in assessing the quality of education offered for FSFA purposes. *Id.*

We find the court's reasoning in *Diop* to be persuasive. Like the plaintiff in *Diop*, Relators contend that Chapman falsely represented compliance with the Carnegie standard, via reports and other communications to WASC, in order to receive accreditation. Specifically, Relators assert that Chapman has a "systematic and chronic practice" of not complying with the Carnegie standard of hour. However, 20 U.S.C. § 1094(a)(2) merely requires Chapman to "meet the requirements established by the accrediting agencies or associations." According to WASC, Chapman has met these requirements. WASC has continually accredited Chapman since 1962, and in 2005, reaffirmed Chapman's accreditation for a period of 8 years. (Fite Dec. ¶ 5; Ex. A.) Chapman's evidence

shows that WASC does not require Chapman to disclose information regarding classroom hours, contact hours or clock hours (Fite Dec. ¶ 7), and Relators have identified no WASC provision to dispute this. In the absence of any WASC requirement of a quantum of classroom hours, Relators cannot establish a false statement that is a condition of government funding. As recognized by the court in *Diop*, the HEA imposes no affirmative duty on Chapman to insure accreditation standards are unfailingly maintained, and no FCA claim can be maintained based on standards that are not a prerequisite to payment of government funds. *Id.* at 523-524.

Plaintiff nevertheless argues, that pursuant to 34 C.F.R. § 668.8(k) and (l), the DOE requires strict adherence to the Carnegie standard.[6] This

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[6] Sections § 668.8(k) and (l) provide:

(k) Undergraduate educational program in credit hours. If an institution offers an undergraduate educational program in credit hours, the institution must use the formula contained in paragraph (l) of this section to determine whether that program satisfies the requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program for purposes of Title IV, HEA programs, unless—

(1) The program is at least two academic years in length and provides an associate degree, a bachelor's degree, a professional degree, or an equivalent degree as determined by the Secretary; or

(2) Each course within the program is acceptable for full credit toward that institution's associate degree, bachelor's degree, professional degree, or equivalent degree as determined by the Secretary, provided that the institution's degree requires at least two academic years of study.

(l) Formula. For purposes of determining whether a program described in paragraph (k) of this section satisfies the

regulation, however, applies to propriety schools, and expressly exempts from its coverage degree-granting institutions such as Chapman. Most of Chapman's undergraduate program are four-year bachelor programs, and all of its undergraduate programs result in at least an associate degree and are at least two years in length. (Knight Dec. ¶¶ 2-4.) Thus, with respect to the first element of an FCA cause of action, Relators have failed to raise a genuine issue of material fact as to whether Chapman made a false statements via its PPAs and its annual audit reports to the DOE.

(b) False Statement – MOU

Relators also contend that Chapman falsely certified its compliance with MOU standards to the Department of Defense, which provides tuition assistance via the GI Bill and Tuition Assistance Program. They argue that the MOD's requires strict adherence with the Carnegie standard. For example, the Air Force's MOD requires Chapman to certify that it adheres to Air Force Quality Education Standards. These standards state, in relevant part:

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requirements contained in paragraph (c)(3) or (d) of this section, and the number of credit hours in that educational program with regard to the Title IV, HEA programs—

(1) A semester hour must include at least 30 clock hours of instruction;

(2) A trimester hour must include at least 30 clock hours of instruction; and

(3) A quarter hour must include at least 20 hours of instruction.

34 C.F.R. § 668.8(k) and (l).

> The Air Force has adopted the Carnegie unit of instruction to establish minimum levels of course contact and preparation, study, and research time outside the classroom. Specifically, for each semester hour of credit, there will be 15 hours of classroom contact (50 minutes of instruction with a 10 minute break each hour) and 30 hours of outside preparation, study and research.

(Bartley Dec., Ex. 18 at D 7096.)

Nevertheless, unlike the PPAs, which Chapman must sign in order to receive Title IV funding, the MOUs on their face are not related to federal or state assistance programs such as Tuition Assistance or GI Bill funding. The MOUs neither enable Chapman to accept Tuition Assistance funding, nor do they qualify Chapman to participate in the Tuition Assistance Program (UF ¶ 19.)[7] Moreover, the only payment information Relators have submitted – an invoice by Chapman to Tuition Assistance for a course given on a military base (Bartley Dec. Ex. 19) – fails to establish a link between the MOU and the Tuition Assistance Program. In contrast, Chapman's evidence shows that the main purpose of the MOUs

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[7] Relators object to this fact, arguing it is immaterial whether Chapman's execution of the MOUs with the individual military installations is an *express* condition of its participation in the Tuition Assistance program and GI Bill, since at the very least, execution of the MOUs is an *implied* condition. (Amended Relators' Separate Statement of Genuine Isses ("RSS"), ¶ 19.) The Court overrules Relators' objection. Given that execution of a PPA is an express condition of any educational institution's participation in the FSFA program, the Court finds it wholly material that there is no similar express condition regarding the Tuition Assistance program or GI Bill.

is not to provide Title IV funding, but rather to provide courses on the military bases for a significantly lower tuition than courses offered to civilians at other Chapman academic centers. (Warner Dec. ¶ 4.) Furthermore, Chapman accepts students' Tuition Assistance or GI Bill educational benefits, whether or not the students attend classes on a military installation. (UF ¶ 19.) The false certification theory of FCA liability is only concerned with false certifications of compliance that are a "*prerequisite to obtaining a government benefit.*" *Hendow*, 461 F.3d at 1172 (citing *Anton*, 91 F.3d at 1266) (emphasis added). Because Relators cannot show this, they have failed to raise a triable issue of fact that Chapman is required to certify compliance with a classroom hours requirement as a necessary condition of obtaining Tuition Assistance or GI Bill funding.

2. Fraudulent Course of Conduct

Relators also contend that Chapman fraudulently conceals from WASC, the DOE and the DOD the systematic and chronic problem of permitting early closure of classes by giving the professor the option to teach several hours of instruction without breaks, and then count clock hours in 50 minute increments. In doing this, the professors accrue the Carnegie 10-minute breaks to justify adjourning classes early. This practice, argue Relators, results in Chapman submitting requests for payment based upon padding hours. Moreover, according to Relators, Chapman has an affirmative duty to voluntarily disclose to WASC, the DOE, and the DOD any significant problems in the area of inadequate administration and quality control,

including any significant failure to adhere to the Carnegie standard. (RSS ¶¶ 58-59, 68-69.) Relators have submitted deposition testimony of Chapman University Campus Director Fearnside that "45 contact hours was a Chapman requirement." (Amended Bartley Dec. Vol. 3, Ex. 44 at 17:18-21.)

Relators have failed to raise a triable issue of fact that Chapman engages in fraudulent conduct by not disclosing to WASC its allegedly widespread and chronic problem of releasing classes early. Relator Moyers testified that Chapman maintained a systematic, chronic, entrenched culture and practice of permitting and encouraging very early class closure. (Moyers Dec. ¶ 5.) However, during the relevant period, Moyers was only exposed to 1.3% of all academic center lecture classes. (Pankey Dec. ¶ 4; Warner Dec. ¶ 2.) Relators have also offered testimony by Dr. James Warren, a full-time program manager of Chapman's Monterey academic center, who stated that student complaints were always about an "overly conscientious" professor forcing his class to stay the full time without the breaks being "grouped together."[8] (RSS ¶ 47.) Although Relators contend that Warren's statement evidences Chapman's acquiesence in the "grouping together" of 10-minute breaks, we find the statement actually supports Chapman's position, since it shows Dr. Warren received no student complaints regarding early dismissal of courses. Furthermore, Fearnside stated that whenever she receives information that

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[8] Chapman does not dispute this fact, but argues it is immaterial since WASC does not require a particular number of hours per class session. (Chapman's Reply to Relator's Separate Statement of Genuine Issues ("RSS"), ¶ 47.)

an instructor may have released classes early, in the follow-up, she has found that in nearly every case, the instructor understands and respects the 45 hour contact hour rule, and had a valid explanation or made other arrangements to make up for the missed class time. (Schenck Dec. Ex. T, ¶ 4.)

Chapman, on the other hand, has submitted competent summary judgment evidence disproving Relator's theory regarding a chronic problem regarding faculty-student contact hours. According to Chapman, even though WASC does not require as much, the university does endeavor to follow the Carnegie standard of 15 contact hours per unit credit, or 45 hours per three unit course. (Graham Dec. ¶¶ 8-11.) When Chapman receives a complaint over a class being let out early, Chapman takes reasonable steps to ascertain whether there was a legitimate reason for the early dismissal. (Schenck Dec. Exs. R-DD.) When a Chapman academic center director determines an instructor released a class early without justification, the director counsels the instructor on Chapman's contact hour rules. (Id.) A persisting problem results in nonrenewal of the instructor's contract. (Id.) Nonetheless, whether or not some Chapman instructors accrue Carnegie 10-minute breaks to justify early dismissal, Relators have offered no evidence of a WASC prohibition against this practice. Consequently, Relators have failed to raise a triable issue of fact as to whether Chapman engaged in a fraudulent course of conduct

In sum, the Court finds that Relators have failed to raise a triable issue of fact as to the first element of a federal False Claims Act claim — that Chapman made a false statement or engaged in a fraudulent

course of conduct. Thus, we need not address the remaining three elements of scienter, materiality, and causation. *Hendow*, 461 F.3d 1171 (citations omitted). The Court therefore GRANTS Defendants' motion for summary judgment on Relators' federal *qui tam* claims.

B. California FCA Claim

As noted previously, the requirements for FCA liability under Cal. Gov't Code § 12651 are the same as for federal liability. *See Pac. Bell Tel. Co.*, 142 Cal.App.4th at 747 n. 3; *see also Shasta Servs., Inc.*, 440 F.Supp.2d at 1111. Accordingly, because Relators have failed to raise a triable issue of fact that Chapman made a false statement or engaged in a fraudulent course of conduct with respect to their federal FCA claims, they have likewise failed to raise a triable issue with respect to their state FCA claims. The Court GRANTS Defendants' motion for summary judgment on Relators' state FCA claims.

IV. CONCLUSION

For the reasons set forth above, the Court hereby GRANTS summary judgment on Relators' FCA causes of action under 31 U.S.C. §§ 3729(a)(1) and (2) and 3729 (a)(2) (Counts 1 and 2) and California FCA causes of action under Cal. Gov't Code §§ 12651(a)(1) and (2) (Counts 3 and 4). It is hereby ordered that this case be DISMISSED in its entirety, with prejudice.

IT IS SO ORDERED.

Initials of Preparer /s/

APPENDIX C

28 U.S.C. § 2107 provides:

§ 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

> **(1)** that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and
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> **(2)** that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

28 U.S.C. § 2106 provides:

§ 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

28 U.S.C. § 230 (1934 ed. Supp. I) provides:

§ 230. Time for making application for appeal.

No appeal intended to bring any judgment or decree before a circuit court of appeals for review shall be allowed unless application therefor be duly made within three months after the entry of such judgment or decree.

28 U.S.C. § 876 (1934 ed. Supp. I) provides:

§ 876. Judgment or decree on review from district court.

The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a district court, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue

execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon.

Rev. Stat. § 701 (1875 ed.) provides:

§ 701. The Supreme Court may affirm, modify, or reverse any judgment, decree, or order of a circuit court, or district court acting as a circuit court, or of a district court in prize cases, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The Supreme Court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon.